KENG HUAT FILM CO. SDN. BHD.

v.

MAKHANLALL (PROPERTIES) PTE. LTD.

FEDERAL COURT
ABDUL HAMID OMAR FJ
MOHD. AZMI FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 184 OF 1982]
20 AUGUST 1983

LANDLORD AND TENANT: *Construction of lease document - Perpetual covenants to renew - Burden of proof - Interpretation of legal instrument - Aids to.*

The appellant is a company owned by one Mr. Ong Keng Huat. In December 1957, Mr. Ong himself and 3 other partners entered into an agreement with the respondent for the lease of Star Theatre, Ipoh. This 1957 lease agreement was for five years from September 1956 with a proviso for the right to renew the lease for a further term of five years, containing the like covenants and provisos. Mr. Ong's partnership with the three other parties was subsequently dissolved at an early stage. Thereafter, Mr. Ong entered into a new lease agreement with the respondent company for the same premises under the name of Keng Huat Film Co. (the appellant). This new lease (hereinafter called the first lease) incorporated a Clause 4(e), similar to Clause 4(e) in the 1957 lease, wherein appellant company *inter alia*, given option to renew lease for another ten years, at the same rent and "containing the like covenants and provisos as were therein contained". When the time for renewal approached, the appellant through its solicitors requested that the renewed lease contain the same terms as the first lease and annexed a draft copy of the second lease for approval by the respondent.

The respondent replied and returned the draft lease duly approved but with Clause 4(e) containing the covenant for renewal deleted. The appellant company disagreed and insisted that by Clause 4(e) in the first lease entitled it to a perpetual covenant to renew. It was this issue of whether Clause 4(e) constituted a perpetual covenant to renew, that went for determination before the High Court. At first instance, the Judge dismissed the appellant's contention that there existed a perpetual covenant to renew. The appellant appealed. The questions raised were:

(i) Did Clause 4(e) which consisted of an option for renewal at the same rent and "containing the like covenants and provisos as were herein contained" give rise to a perpetual covenant to renew?

(ii) Was it improper for the Judge to admit evidence of the respondent's intention in granting the lease?

Held:

[1] The burden of proof of a right to perpetual renewal is on the party who seeks it.

[2] The established principle is that the Court leans against a construction for perpetual renewal unless clearly indicated by using an inclusive phrase *viz.* a phrase specifying that a covenant to renew is to apply.

[3] A legal instrument such as a lease

(i) should not be construed by the acts of the parties nor by their understanding of the document.

(ii) can be interpreted with the aid of the factual back-ground circumstances surrounding the lease and not pre-contract negotiation.

[Appeal dismissed.]

Cases referred to:
Re Hopkin's Lease [1972] 1 All ER 248; [1972] 1 WLR 372
H.L. Bannerji v. Chin Cheng Realty (Pte) Ltd. [1983] 1 MLJ 18
Sir John Swinburne v. George Milburn & Ors. [1884] HL (E) 844
Baynham v. Guy's Hospital [1796] Ch 3 Vesey 295
Moore v. Foley [1801] Ch 6 Vesey 232
Hare v. Burges [1857] 70 ER 23
Bridges v. Hickcock [1715] 2 ER 48
Furnival v. Crew [1744] 26 ER 851
Iggulden v. May [1806] KB VIII 623
Sadlier v. Biggs [1853] 10 ER 531
Prenn v. Simmonds [1971] 3 All ER 237
Citibank N.A. v. Ooi Boon Leong & Ors. [1981] 1 MLJ 282

Legislation referred to:
National Land Code 1965, s. 221(3)(a)
Evidence Act 1950, ss. 91-99

Other sources referred to:
Encyclopaedia of forms and precedents 3rd Edn., Vol., 8, p. 230, Clause 3

For the appellant - Lim Kean Chye; M/s. Chooi & Co.
For the respondent - R.K. Sharma; M/s. Sharma & Co.

JUDGMENT

Mohd. Azmi FJ:

The appellant's claim in this action is that under the terms of a lease agreement dated 14 February 1968, it is entitled to a perpetual covenant to renew the lease every 10 years, and therefore it prays for specific performance of the renewed lease which the covenant for perpetual renewals inserted as a term of the agreement. Although the principal issue for determination in this appeal is one of construction of Clause 4(e) in the lease (Exhibit AB37, pp. 86-100 of records), we propose to lay down the undisputed facts of the case which led to the present dispute. The respondent company and its predecessor in title, Mr. Makhanlall, owned three cinemas situated in Kuala Lumpur, Penang and Ipoh - all named as Star Theatre. At various periods before the dispute, the three cinemas were leased to Mr. Ong Keng Huat (PW1) either personally, or jointly with his partners, or leased to his company - the appellant. The negotiations as to the various leases were conducted by Mr. Makhanlall and subsequently by his son Mr. Shasikant Gupta (DW1) when Mr. Makhanlall became ill and died in 1969. We are not concerned, however, with

the Penang and Kuala Lumpur Star Theatres. The dispute related only to the Ipoh Star Theatre at No. 130 Chamberlain Road, and as such we would confine ourselves, as did the trial Judge, to the lease granted by the respondent to the appellant in respect of this particular cinema. It was on 27 December 1957 that the respondent company entered into an agreement (Exhibit AB1, pp. 50-64 of records) with Mr. Ong Keng Huat and his partners Tan Chong, Teh Guan Hone and Hongkong United Company Limited whereby the respondent demised 10 lots of land on which the Star Theatre was situated, upon a lease for a period of 5 years from 1 September 1956. Under Clause 4(e) of the said agreement the lessees had a right to renew the lease for a further period of 5 years from the expiration of the term, at the same rent and containing the like covenants and provisos as were contained in the agreement. The option was never exercised by the partnership due to its early dissolution, but about two weeks before the expiry of the 1957 lease, Mr. Ong Keng Huat instructed his solicitors to request the respondent by letter dated 15 August 1961 for a lease of the cinema "for a period of 10 years with an option to renew for a further period of 5, 7 or 10 years" (Ex. D3). Nothing came out of this request and although no valid lease was granted to cover the period from 1 September 1961 to 31 August 1966, Mr. Ong Keng Huat entered into a fresh agreement with the respondent company through its director Mr. Makhanlall who was his close friend, originally in his own name but subsequently a separate agreement which is the one under dispute, was entered into in the name of his company, Keng Huat Film Company Sdn. Bhd. (the appellant) dated 14 February 1968 giving the appellant a lease for 5 years of the Star Theatre effective retrospectively from 1 September 1966 and expiring on 31 August 1971 (hereinafter referred to as "the first lease"). Under Clause 4(e) of the first lease which was similar in terms to Clause 4(e) in the 1957 lease, the appellant was given an option to renew the lease for a further 10-year period upon giving the respondent a written 6 months notice of the intention to renew. Under the said clause it was also provided that the lessor would grant to the lessee at the expiration of the lease a further term of 10 years, at the same rent and containing the like covenants and provisos as were therein contained. It is this covenant to renew the lease which has come up for determination both here and the Court below. There is no dispute that on 10 February 1971 the appellant gave the necessary notice through its solicitors of its intention to renew the lease which was expiring on 31 August 1971 (Exhibit AB52). The letter requested, *inter alia*, that the renewed or second lease should contain the same terms and conditions as the first lease. By letter dated 2 August 1971 (Exhibit AB53), the appellant's solicitors again wrote to the respondent enclosing a draft copy of the second lease for necessary approval. The respondent replied by letter dated 20 August 1971 (Exhibit AB54) returning the draft lease duly approved but with Clause 4(e) containing the covenant for renewal deleted (see pp. 101-103 of records). The respondent's stand was that the appellant company was only entitled to a second lease for ten years without inclusion of the covenant for renewal. The appellant disagreed and insisted that by Clause 4(e) in the first lease, it was entitled to a perpetual covenant to renew i.e. inclusion of the covenant for renewals; hence the present dispute. The learned trial Judge agreed with the exclusion of the covenant in the second lease and dismissed the appellant's claim for specific performance of the second agreement as originally drafted, and allowed respondent's counterclaim

for a declaration that the first lease dated 14 February 1968 was not intended to be a perpetual lease. No order was made on respondent's counter-claim for rectification in the alternative. In its statement of defence the respondent company averred by paragraph 4 that it was prepared to grant a lease for a further term of ten years from the date of expiry of the first lease at the same rent and containing the same covenants except the covenant for renewal. Although the second lease had never been executed, it would appear that the appellant continued to remain in possession of the cinema till today; and it was not until 18 January 1981 respondent's solicitors wrote to the appellant for delivery of vacant possession of the premises and effects by 31 August 1981 (see AB63, p. 112 of records). The appellant refused to vacate contending that it had a right to perpetual renewal under the first lease which had the effect of granting a perpetual lease if the option to renew was exercised on each occasion, and such perpetual lease would be valid for 99 years under s. 221(3)(a) National Land Code.

The learned trial Judge did not consider the other defences put up by the respondent company and decided the dispute purely on the construction of Clause 4(e) of the first lease dated 14 February 1968. We see no reason to depart from the learned Judge's approach and we will also confine ourselves primarily to the issue of construction of the said covenant. For the determination of this appeal there is therefore no necessity to go into other issues raised by the Defence such as mistake in drawing up the first lease or on disputed issues of fact in the evidence of Mr. Ong Keng Huat (PW1) and Mr. Shashikant Gupta (DW1).

The first ground of appeal is that the learned Judge was wrong in dismissing the appellant's claim and in declaring that the first lease was not intended to be a perpetual lease. In dealing with the law, the learned Judge had this to say in his grounds:

> The law as regards perpetual renewals is very clear. A provision that the new lease is to contain the same covenants as the old lease does not entitle the tenant to have the covenant for renewal inserted, so as to give perpetual renewal (see Halsbury Vol., 27 at p. 280). In *Moore v. Foley* [1801] Ch 6 Vesey 232, p. 275 Grant MR said that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease, not a perpetual lease.

We are of the view that a more accurate statement of the law of such covenant for renewals can be found in the judgment of Russell LJ in *Re Hopkin's Lease* [1972] 1 All ER 248; [1972] 1 WLR 372 which was extensively quoted by Chua J in *H.L. Bannerji v. Chin Cheng Realty (Pte) Ltd.* [1983] 1 MLJ 18. The relevant part of Russell LJ's judgment at p. 251 is as follows:

> The approach to the question whether a lease is perpetually renewable is not in doubt. The language used must plainly lead to that result; although the fact that an argument is capable of being sustained at some length against that result does not of course suffice.
>
> As a matter of history, when a covenant by a lessor conferred a right to renewal of the lease, the new grant to contain the same or the like covenants and provisos as were contained in the lease, the Courts refused to give literal effect to that language, which if taken literally would mean that the second lease would contain the same covenant (or option) to renew, *totidem verbis*, and so on perpetually. The reference to the same

covenants was construed as not including the option covenant itself. This limited the tenant's right to one renewal. In order, therefore, to make it plain that the covenants to be contained in the second lease (to be granted under the exercise of the option to renew) were to include also the covenant to renew, draftsmen were accustomed to insert phrases such as 'including this covenant', so as to achieve a perpetually renewable lease. As I have indicated, if they did not do this, the second lease would not contain any option clause. The operation of the words of inclusion was not limited to requiring the second lease to contain a covenant to renew once more only, which would have been the outcome if the words of inclusion had been omitted in the second lease. This was because the words of inclusion could not properly be construed as requiring the second lease to contain the same covenants other than the covenant to renew but additionally to include an option to renew once more only - a total of three terms. The words of inclusion defined or explained what was meant by 'the same covenants', that is to say, as including the covenant to renew. Consequently in the second lease, in order to comply with the words of definition or explanation, the covenants referred to therein to be contained in the second lease must contain the same wording including the inclusion.

Now, what is the effect of Clause 4(e) at p. 97 of appeal records? Would renewal of the first lease include or exclude the covenant to renew; and would such a clause entitle the appellant/lessee to a perpetual lease in that he is entitled to renew the lease every ten years, or is he entitled merely to a second lease of ten years without the inclusion of the covenant to renew? The words used in Clause 4(e) were:

... then the Lessors will grant to the Lessee a lease of the demised premises for a further term of ten (10) years from the expiration of the said term at the same rent and containing the like **covenants and provisos as are herein contained ...** (Emphasis is ours).

We are informed by Mr. Lim Kean Chye, counsel for the appellant, that Clause 4(e) was drafted by a solicitor based on *Encyclopaedia of Forms and Precedents* 3rd Edn., Vol., 8 at p, 230 Clause 3. We note that the example given in Clause 3(2) if completely followed viz.

"... containing the like covenants and provisos as are herein contained with the exception of the present covenant for renewal ...",

would have made it very clear with no ambiguity whatsoever that Clause 4(e) could not confer perpetual renewal, because of the expressed words of exclusion. Equally, if an 'inclusive phrase' had been used such as in *Re Hopkin's Lease* (ante) *viz*.

... grant to him a lease of the said demised land for the further term of 5 years from the expiration of the said term hereby granted at the same rent and containing the like covenants and provisos as are herein contained (including an option to renew such lease for the further term of 5 years at the expiration thereof) ...,

then there could be no doubt that the lease would confer the right to perpetual renewals, if all the provisos such as the giving of requisite notice by the lessee to the lessor had been complied with. In that case, it was held by the Court of Appeal that the words in brackets in Clause 4(3) of the first lease, made it clear that the phrase was intended to include in the second 5-year term an option to renew; if the second lease repeated the words of the covenant without the words in brackets, the second lease would not be

carrying out the requirement of the first lease, i.e. would not be granting an option for a further lease containing 'the like covenants ... as herein contained'; accordingly the second lease must also contain the covenant in Clause 4(3) and therefore the terms of the first lease were such as to create a perpetually renewable lease. In the present appeal we are faced with a situation where the clause relied upon by the appellant did not contain either words of exclusion or inclusion or other words to define or explain what was meant by, "containing the like covenants and provisos as are herein contained", used in Clause 4(e). This does not mean that certain technical words or special formula must be used for perpetual renewals. What is required is that the idea should be clearly expressed by the words used. As stated by Lord Blackburn in *Sir John Swinburne v. George Milburn and Others* [1884] H.L.(E) 844 at p. 852:

> It is implied, I think, though not expressed, that the fresh terms shall, *mutatis mutandis*, be like the present, but that is not enough to express that it shall contain a covenant to renew (*Moore v. Foley* (1)), and there are no words of a like effect to those which in *Hare v. Burges* (2) were, I think rightly, held to express that the new lease was to contain a similar covenant to renew.

In *Bannerji's* case (ante), Chua J had no difficulty in holding that the lease before him was perpetually renewable because of the words, "including the present covenant to renew", immediately following the words, "containing the like covenants and provisos as are herein contained". Though Clause 4(e) was purported to have been drafted from the *Encyclopaedia of Forms and Precedents*, we are satisfied that it falls materially short of the example given in Clause 3(2) at p. 230. In law the burden of proving the existence of a right to perpetual renewals is on the appellant/plaintiff (see *Sir John Swinburne v. George Milburn and Others* (ante)). We are therefore left with the task of construing the disputed words in Clause 4(e) without any words of explanation. In answer to our question, Mr. Lim Kean Chye says the words used are sufficiently clear to confer perpetual covenant to renew and it makes no difference that it contained neither the 'excluding phrase' nor the 'inclusive phrase'. The absence of the words of exclusion according to him would make it even a stronger case for inclusion of the covenant to renew. On authorities governing the principle of construction in this type of covenant, we must disagree. The established principle is that the Court leans against a construction for perpetual renewal, unless clearly intended, and in discovering such clear intention, the legal instrument should not be construed by the acts of the parties (see *Baynham v. Guy's Hospital* [1796] Ch - 3 Vesey 295 and *Moore v. Foley* [1801] Ch - 6 Vesey 232-238).

The question for determination before us as stated earlier on, is whether on the true construction of Clause 4(e) of the first lease dated 14 February 1968 the appellant/lessee is conferred with a lease perpetually renewable. In short, are the words used unambiguous and clear so that the renewed lease should include the covenant to renew as claimed by the appellant, or are the words ambiguous as contended by the respondent? In our view the words, "containing the like covenants and provisos as are herein contained" constitute a general covenant and such words without more are far from clear and fall short of legal requirement to confer what in effect would amount to a perpetual

lease by means of perpetual renewals. In the light of the words used we agree with the learned trial Judge that on the true construction of Clause 4(e) it does not confer the appellant/lessee with the right to perpetual covenant for renewals. The three cases argued before the trial Judge - *Hare v. Burges* [1857] 70 ER 23 *Bridges v. Hickcock* [1715] 2 ER 48; *Furnival v. Crew* [1744] 26 ER 851 - were referred to and explained in *Iggulden v. May* [1806] KB 623 and they do not carry the appellant's cause any further. We have also looked into other parts of the first lease for any evidence to support the appellant's claim and we found none. On the contrary, Clause 2(p) imposes an obligation on the part of the appellant to yield up the demised premises together with all "the Effects" (except tenant's fittings, machinery and fixtures) at the expiration or sooner determination of the lease in good and substantial order and condition. "The Effects" referred to is defined in the preamble as, "fittings, fixtures, installations, chairs and furniture in, upon and about the demised premises belonging to the lessors specified in the Third Schedule" (see pp. 89 and 98 of records). The inclusion of this expiry provision particularly relating to a long list of chattels does not seem to support any intention to create a lease in perpetuity. In our view the appellant has failed to discharge the burden of proving its claim and on the issue of construction alone this appeal should be dismissed.

The other ground of appeal is that the learned trial Judge was wrong in admitting evidence of the respondent's intention. In particular, the complaint before us is that the Judge must not look at the earlier lease of the cinema dated 27 December 1957 (Exhibit AB1) for the purpose of interpretation. From the notes of evidence the Judge did admit evidence of other leases including the 1957 lease. Reference to this particular lease was made in the following passage of his Judgment:

> The main issue to be decided therefore is the construction of Clause 4(e) of the Agreement. Is this or is this not a right to perpetual renewal. In other words, does this give the plaintiffs a right to a lease in perpetuity.
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> It would appear to me that as far as Ong Keng Huat is concerned the lease had been a continuous one since 1957. He had been a party to the lease right from the beginning. But although he had entered into four different agreements of lease, there are only two agreements tendered in Court. One is dated 27 December 1957 (Exb. P1 p. 1) and the other dated 14 February 1968 (Exb. P1 p. 37).
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> It is significant to note that in the agreement dated 27 December 1957 the option for renewal was for 5 years. The option for renewal in the agreement dated 14 February 1968 gave the plaintiff a right to a renewal of 10 years. This is not consistent with the plaintiffs' claim that they have a right to a renewed lease containing '... the like covenants and provisos as are herein contained ... Obviously, the two leases do not contain the same covenants and provisos. It would appear therefore that the parties are free to negotiate for a fresh term. The phrase '... the like covenants and provisos, as are herein contained ...' becomes a mere legal jargon without any force.

It is a well-established rule that the Court cannot construe a legal document such as a lease by the acts of the parties or their own understanding of the document. In *Baynham v. Guy's Hospital* (ante) which was referred to in *Sadlier v. Biggs*, [1853] 10 ER 531, Arden MR had this to say:

> I strongly protest against the argument used by the learned Judges in *Cooke v. Booth,* Cow p. 819, as to construing a legal instrument by the equivocal acts of the parties and their understanding upon it; which I will never allow to affect my mind.

As far as our law is concerned the exclusion of oral by documentary evidence, is governed by ss. 91 to 99 of the Evidence Act 1950. Section 91 provides that the contents of a document must be proved by the document itself, and s. 92 provides that subject to certain provisos, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or substracting from its terms. Section 93 further provides that when the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. But Mr. Lim Kean Chye has placed reliance on the case of *Prenn v. Simmonds* [1971] 3 All ER 237 where Lord Wilberforce had said in *per curium* at p. 241 that:

> evidence of negotiations or of the parties' intentions ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

It should be noted that in *Prenn's* case (ante) the House of Lords refused to extend the Court's interpretative power by allowing pre-contract negotiations to be looked at in aid of the construction of a written document, by emphasising "the disadvantages and danger of departing from established doctrine and the virtue of the latter'. For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hope to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible. On the facts, we do not think that the 1957 lease can be classified as evidence of negotiation leading up to the first lease in 1968. We note that the 1957 lease was part of the agreed bundle of documents and its existence and contents were not in dispute although the subject matter of that lease was the same cinema and Mr. Ong Keng Huat was one of the lessees. It also contained Clause 4(e) with option clause in *pari materia* with Clause 4(e) in the first lease which is under dispute. It seems to us therefore that the 1957 lease should be classified as a factual background of the case known to the parties at or before the first lease was executed and therefore admissible in evidence, and the trial Judge was entitled to use it not for the purpose of construing the first lease but for showing inconsistency between the factual background and the claim of the appellant to perpetual renewals of the first lease (see *Citibank N.A. v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282). In any event, it is our view that in the present case, the first lease on its face, is sufficient to construe Clause 4(e) without the necessity to supplement it by extraneous evidence. Mr. Lim Kean Chye has taken the trial Judge to task for describing the words used in Clause 4(e) as "mere legal jargon". We can only assume that the description refers to the fact that the words used were not clear, and in that context the learned Judge was correct. In the absence of explanatory words, they stood as mere legal jargon creating no right whatsoever to perpetual lease.

We dismiss this appeal with costs. Deposit to the respondent on account of taxed costs. We further order that costs of application for stay be taxed and paid to the respondent.

Also found at [1983] 2 CLJ 187